IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

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SUPREME COURT, U. S.

No. 73-5768

FRANK XAVIER FRANCISCO, Petitioner,

v.

J. S. GATHRIGHT, Superintendent, Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY TO THE BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 24(4) of the Rules of the Court petitioner Frank X. Francisco submits this Reply to arguments first raised by respondent J. S. Gathright in his Brief in Response to Petition for Writ of Certiorari filed on or about February 6, 1974. The issues raised in Section B of the Petition for Writ of Certiorari (pp. 9-11) appear adequately joined by the papers now on file. Accordingly, this Reply will be confined to the issues raised in Section A of the Petition (pp. 7-9).

Although familiarity with the Petition for Writ of Certiorari will be assumed, petitioner's contentions may be basically summarized as

follows: Petitioner challenged his conviction in state court by way of direct appeal, asserting, among other grounds for reversal, that a jury instruction denied him liberty without due process of law in that it was a presumption without a rational basis. The Virginia Supreme Court rejected this claim without opinion. At about the time petitioner presented the same claim in a federal habeas corpus proceeding, the Virginia Supreme Court in Sharp v. Commonwealth, 213 Va. 269, 192 S.E 2d 217 (1972), found an identical instruction unconstitutional. The district court dismissed the petition for writ of habeas corpus to allow the state courts to rule on petitioner's claim. This decision is "in irreconcileable conflict with Roberts v. LaVallee [389 U.S. 40 (1967)]." Petition at 8.

The nub of respondents argument is as follows:

> "The difference between petitioner's case and Roberts v. LaVallee, 389 U.S. 40, 19 L. Ed. 2d 41, 88 S. Ct. 194 (1967), cited in the petition for a writ of certiorari, is that the petitioner has not really fully exhausted his State court remedies inasmuch as he has not yet presented to the State courts the question of whether his conviction is made infirm by the fact that a Sharp instruction was used at his trial. Obviously, this was not the issue confronting the Virginia Supreme Court when petitioner directly appealed his conviction, since the Virginia Supreme Court had not yet decided the case of Sharp v. Commonwealth, supra, and therefore, in effect the petitioner in his federal habeas corpus petition was raising an allegation in a different context than it had been previously raised in the Virginia Supreme Court. As pointed out in Picard v. Connor, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971), this is sufficient basis for the District Court having sent the matter back to the State court for determination of petitioner's allegation." Respondent's Brief at 10.

This argument is both inconsistent with respondent's position in the courts below and unsupported by authority.

Respondent conceded in paragraph 3 of his answer to the petition for writ of habeas corpus filed in district court that "petitioner has exhausted his State court remedies." The district judge found that "Francisco has exhausted his remedies before on this issue." Opinion at 10, Appendix to Petition for Writ of Certiorari at 13a. Thus respondent seeks to abandon in this Court a position it took below, a position found to be correct by the fact-finder. Apart from respondent's newly adopted legal position, the fact remains that petitioner has exhausted his state remedies by presenting the identical issue on direct appeal. Thus Roberts v. LaVallee is controlling. Roberts unsuccessfully presented a constitutional claim to the highest court of the State; so did petitioner Frank Francisco. That court subsequently recognized, in another individual's appeal, that the earlier asserted claim was meritorious; so did the Virginia Supreme Court in the instant case. This Court rejected the State's argument that the subsequent state decision required that Roberts again present his claim to the state judicial system; This Court should reject respondent's argument that petitioner Frank Francisco must again present his claim to Virginia's judicial system, which had earlier rejected it.

Contrary to respondents assertion, petitioner has presented to the Virginia Supreme Court the question of whether his conviction is constitutionally infirm by reason of a jury instruction which amounted to a denial of due process. The state court's tardy recognition in Sharp of well-established Constitutional principles is respondent's justification for requiring petitioner to again present that claim to the state courts. This position flies in the face of the principle that habeas corpus petitioners are not required to make repetitious applications for relief. Picard v. Conner, 404 U.S. 270 (1971), relied upon by respondent is wholly

inapposite. Petitioner challenged his conviction on direct appeal, contending that a jury instruction deprived him of liberty without due process of law in that it set forth a presumption without rational basis. It was in this context that the Virginia Supreme Court refused, without opinion, to set aside his conviction. It was in this context that the claim was presented to the district court. This contextual identity is strikingly illustrated by comparison of the Sharp opinion with the papers filed in petitioner's direct appeal. In reversing Sharp's conviction on the ground that the instruction given was unconstitutional, the Virginia Supreme Court relied upon and quoted from this Court's decision in Leary v. United States, 395 U.S. 6, 36 (1969). The Petition for Writ of Error filed on petitioner's behalf in the Virginia Supreme Court (a copy of which was in the record provided the district court) had quoted the identical passage from Leary in support of petitioner's contentions on the instruction issue.

Moreover, despite his consistent reliance on Sharp throughout the proceedings in federal court, respondent concedes that "the Virginia Supreme Court has, since the Sharp v. Commonwealth case was decided refused to grant petitions for writs of error in other cases where a so-called ruling." */ Respondent's Brief at 7. Thus there is substance to petitioner's concern that he will "be required to exhaust himself by becoming a ping-pong ball batted back and forth between two judicial systems." Petition at 7.

*/ Respondent refers to the instruction which petitioner has consistently challenged as a "Sharp instruction," and the issue presented in this challenge as a "Sharp issue." However convenient this shorthand notation, petitioner's unwavering position is and has been that the instruction used at his trial was unconstitutional under the principles of Leary v. United States, supra. The fact that the Virginia Supreme Court tardily recognized those principles in Sharp has little bearing on the merits of petitioner's claim.

Respondent's further reliance on the deliberate bypass of state remedies doctrine is misplaced. That doctrine bars collateral attack on a conviction where a constitutional claim was deliberately withheld by the defendant in the original criminal case. The state court proceedings referred to by respondent in pages 4-6 of his Brief and in Exhibits A-E thereto occurred subsequent to the criminal case. Moreover, these proceedings occurred subsequent to the district court's decision in the habeas corpus proceedings and are no part of the record before this Court.

For the foregoing reasons and those set forth for the Petition for Writ of Certiorari it is urged that the writ should be granted.

Respectfully submitted,

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